

1 SHEPPARD MULLIN RICHTER & HAMPTON LLP  
2 A Limited Liability Partnership  
3 Including Professional Corporations  
4 JAMES M. BURGESS, Cal. Bar No. 151018  
5 BRIDGET J. RUSSELL, Cal. Bar No. 288107  
6 1901 Avenue of the Stars, Suite 1600  
7 Los Angeles, California 90067  
8 Telephone: 310.228.3700  
9 Facsimile: 310.228.3701  
10 E-Mail: jburgess@sheppardmullin.com  
11 brussell@sheppardmullin.com

12 Attorneys for Defendants  
13 BANIR GANATRA, ALLAN JABCZYNSKI  
14 and AMERICOR FUNDING, INC.

15  
16 UNITED STATES DISTRICT COURT  
17 CENTRAL DISTRICT OF CALIFORNIA

18 BUSINESS SOLUTIONS, LLC, a  
19 Delaware limited liability company,

20 Plaintiff,

21 v.  
22

23 BANIR GANATRA, an individual,  
24 ALLAN JABCZYNSKI, an  
individual, AMERICOR FUNDING,  
25 INC., a Delaware corporation,  
BRANDREP, LLC, a Delaware  
limited liability company, and  
26 BRANDREP HOLDINGS, LLC, a  
Delaware limited liability company,  
27

28 Defendants.

Case No. 8:18-cv-01426

**FIRST AMENDED ANSWER BY  
DEFENDANTS BANIR GANATRA,  
AMERICOR FUNDING, INC, AND  
ALLAN JABCZYNSKI; AND  
DEFENDANT AND  
COUNTERCLAIMANT JABCZYNSKI'S  
FIRST AMENDED COUNTERCLAIM**

[Complaint filed August 10, 2018]

## AMENDED ANSWER

3 Defendants Banir Ganatra (“Ganatra”), Allan Jabczynski  
4 (“Jabczynski”) and Americor Funding, Inc. (“Americor”) (collectively, the  
5 “Americor Defendants”) hereby amend their answer to the Complaint filed by  
6 Plaintiff Business Solutions (“Plaintiff” or “Business Solutions”) by admitting,  
7 denying and alleging as follows:

## **COMPLAINT**

10           1. Unnumbered paragraph 1 of the Complaint consists of Plaintiff's  
11 characterization as to the nature of the action, to which no response is required. To  
12 the extent a response may be deemed to be required, the Americor Defendants admit  
13 only that Plaintiff filed this action. Except to the extent the allegations in  
14 unnumbered paragraph 1 of the Complaint are specifically admitted, the Americor  
15 Defendants deny each and every remaining allegation contained therein.

17           2. In response to unnumbered paragraph 2 of the Complaint, the  
18 Americor Defendants admit that BrandRep, LLC and BrandRep Holdings, LLC (the  
19 “BrandRep Defendants”) filed a lawsuit against Deirdre Mammano (“Mammano”),  
20 Plaintiff and Mr. Chad Ruskey, among others, in the Chancery Court of the State of  
21 Delaware. Except to the extent the allegations in unnumbered paragraph 2 of the  
22 Complaint are specifically admitted, the Americor Defendants deny each and every  
23 remaining allegation contained therein.

25           3.     In response to unnumbered paragraph 3, the Americor  
26 Defendants admit that Jabczynski applied for and was offered a job at Americor  
27 while he was employed by Plaintiff. Except to the extent the allegations in

1 unnumbered paragraph 3 of the Complaint are specifically admitted, the Americor  
2 Defendants deny each and every remaining allegation contained therein.  
3

4       4. Unnumbered paragraph 4 of the Complaint consists of Plaintiff's  
5 characterization as to the nature of the action, to which no response is required. To  
6 the extent a response may be deemed to be required, the Americor Defendants admit  
7 that Plaintiff filed this action, and seeks the relief it seeks. Except to the extent the  
8 allegations in unnumbered paragraph 4 of the Complaint are specifically admitted,  
9 the Americor Defendants deny each and every remaining allegation contained  
10 therein.

11

12       5. In response to paragraph 1, the Americor Defendants are without  
13 sufficient knowledge or information to form a belief as to the truth of such  
14 allegations, and on that basis deny each and every allegation contained therein.  
15

16       6. In response to paragraph 2, the Americor Defendants deny all of  
17 the allegations contained therein.  
18

19       7. In response to paragraph 3, the Americor Defendants admit all of  
20 the allegations contained therein.  
21

22       8. In response to paragraph 4, the Americor Defendants deny all  
23 allegations contained therein.  
24

25       9. In response to paragraph 5, the Americor Defendants admit that  
26 BrandRep Holdings, LLC is a Delaware limited liability company. Except to the  
27 extent the allegations in paragraph 5 of the Complaint are specifically admitted, the  
28 Americor Defendants deny each and every remaining allegation contained therein.

1           10. In response to paragraph 6, the Americor Defendants admit all of  
2 the allegations contained therein.

3  
4           11. In response to paragraph 7, the Americor Defendants respond  
5 that Plaintiff's allegations are legal conclusions for which no response is required.  
6 To the extent a response is required, the Americor Defendants deny each and every  
7 allegation contained in paragraph 7.

8  
9           12. In response to paragraph 8, the Americor Defendants respond  
10 that Plaintiff's allegations are legal conclusions for which no response is required.  
11 To the extent a response is required, the Americor Defendants admit only that venue  
12 is proper in this Court. Except to the extent specifically admitted, the Americor  
13 Defendants deny the remaining allegations of paragraph 8.

14  
15          13. In response to paragraph 9, the Americor Defendants respond  
16 that Plaintiff's allegations are legal conclusions for which no response is required.  
17 To the extent a response is required, the Americor Defendants admit that this Court  
18 has personal jurisdiction over Defendants, that Ganatra and Jabczynski reside within  
19 this Judicial District and that Americor and the BrandRep Defendants have a  
20 principal place of business within this Judicial District. Except to the extent  
21 specifically admitted, the Americor Defendants deny the remaining allegations of  
22 paragraph 9.

23  
24          14. In response to paragraph 10, the Americor Defendants are  
25 without sufficient knowledge or information to form a belief as to the truth of such  
26 allegations, and on that basis deny each and every allegation contained therein.

1           15. In response to paragraph 11, the Americor Defendants are  
2 without sufficient knowledge or information to form a belief as to the truth of such  
3 allegations, and on that basis deny each and every allegation contained therein.  
4

5           16. In response to paragraph 12, the Americor Defendants are  
6 without sufficient knowledge or information to form a belief as to the truth of such  
7 allegations, and on that basis deny each and every allegation contained therein.  
8

9           17. In response to paragraph 13, the Americor Defendants are  
10 without sufficient knowledge or information to form a belief as to the truth of such  
11 allegations, and on that basis deny each and every allegation contained therein.  
12

13           18. In response to paragraph 14, the Americor Defendants are  
14 without sufficient knowledge or information to form a belief as to the truth of such  
15 allegations, and on that basis deny each and every allegation contained therein.  
16

17           19. In response to paragraph 15, the Americor Defendants are  
18 without sufficient knowledge or information to form a belief as to the truth of such  
19 allegations, and on that basis deny each and every allegation contained therein.  
20

21           20. In response to paragraph 16, Jabczynski admits that he signed an  
22 Acknowledgment that Plaintiff provided him with an Employee Handbook. Except  
23 to the extent the allegations in paragraph 16 of the Complaint are specifically  
24 admitted by Jabczynski, he denies each and every remaining allegation contained  
25 therein. Americor and Ganatra are without sufficient knowledge or information to  
26 form a belief as to the truth of the allegations in paragraph 16, and on that basis deny  
27 each and every allegation contained therein.  
28

1           21. In response to paragraph 17, the Americor Defendants are  
2 without sufficient knowledge or information to form a belief as to the truth of such  
3 allegations, and on that basis deny each and every allegation contained therein.  
4

5           22. In response to paragraph 18, the Americor Defendants are  
6 without sufficient knowledge or information to form a belief as to the truth of such  
7 allegations, and on that basis deny each and every allegation contained therein.  
8

9           23. In response to paragraph 19, the Americor Defendants are  
10 without sufficient knowledge or information to form a belief as to the truth of such  
11 allegations, and on that basis deny each and every allegation contained therein.  
12

13           24. In response to paragraph 20, Jabczynski admits that he was  
14 employed by Plaintiff dba Ad.IQ, from in or around November 2017 until July 5,  
15 2018, in an inside sales position, responsible for business development and online  
16 marketing strategy consulting. Jabczynski further admits that he signed his offer  
17 letter from Plaintiff upon accepting employment. Jabczynski is without sufficient  
18 knowledge or information to form a belief as to the truth of the remaining  
19 allegations in paragraph 20 and, therefore, except to the extent the allegations in  
20 paragraph 20 of the Complaint are specifically admitted by Jabczynski, he denies  
21 each and every remaining allegation contained therein. Americor and Ganatra are  
22 without sufficient knowledge or information to form a belief as to the truth of the  
23 allegations in paragraph 20, and on that basis deny each and every allegation  
24 contained therein.  
25

26           25. In response to paragraph 21, Jabczynski admits that he had  
27 access to a customer relationship management software program at Business  
28 Solutions. Except to the extent the allegations in paragraph 21 of the Complaint are

1 specifically admitted by Jabczynski, he denies each and every remaining allegation  
2 contained therein. Americor and Ganatra are without sufficient knowledge or  
3 information to form a belief as to the truth of the allegations in paragraph 21, and on  
4 that basis deny each and every allegation contained therein.

5

6       26. In response to paragraph 22, the Americor Defendants admit that  
7 Jabczynski applied for employment with Americor. Except to the extent specifically  
8 admitted, the Americor Defendants deny the remaining allegations of paragraph 22.

9

10      27. In response to paragraph 23, Jabczynski admits that, while  
11 employed by Plaintiff, he accessed Business Solutions customer relationship  
12 management software program, and properly kept records of the commissions he  
13 had earned. Except to the extent the allegations in paragraph 23 of the Complaint  
14 are specifically admitted by Jabczynski, he denies each and every remaining  
15 allegation contained therein. Americor and Ganatra are without sufficient  
16 knowledge or information to form a belief as to the truth of the allegations in  
17 paragraph 23, and on that basis deny each and every allegation contained therein.

18

19      28. In response to paragraph 24, Jabczynski denies all of the  
20 allegations contained therein. Moreover, Ganatra and Americor are without  
21 sufficient knowledge or information to form a belief as to the truth of such  
22 allegations, and on that basis deny each and every allegation contained therein.

23

24      29. In response to paragraph 25, Jabczynski denies all of the  
25 allegations contained therein. Moreover, Ganatra and Americor are without  
26 sufficient knowledge or information to form a belief as to the truth of such  
27 allegations, and on that basis deny each and every allegation contained therein.

30. In response to paragraph 26, the Americor Defendants deny all of the allegations contained therein.

31. In response to paragraph 27, the Americor Defendants respond that Plaintiff's allegations are legal conclusions for which no response is required. To the extent a response is required, the Americor Defendants deny all of the allegations contained therein.

COUNT I

**Misappropriation of Trade Secrets pursuant to 18 U.S.C. § 1836(b)  
(All Defendants)**

32. In response to paragraph 28, the Americor Defendants repeat each and every of their respective allegations, admissions and denials contained in paragraphs 1 through 31, and incorporate same by reference as though fully set forth herein.

33. In response to paragraph 29, the Americor Defendants state that this paragraph consists solely of legal propositions and conclusions for which no response is required. To the extent a response is required, the Americor Defendants deny each and every allegation of paragraph 29.

34. In response to paragraph 30, the Americor Defendants deny each and every allegation contained therein.

35. In response to paragraph 31, the Americor Defendants deny each and every allegation contained therein.

36. In response to paragraph 32, the Americor Defendants state that this paragraph consists solely of legal propositions and conclusions for which no response is required. To the extent a response is required, the Americor Defendants deny each and every allegation of paragraph 32.

37. In response to paragraph 33, the Americor Defendants state that this paragraph consists solely of legal propositions and conclusions for which no response is required. To the extent a response is required, the Americor Defendants deny each and every allegation of paragraph 33.

38. Paragraphs 34-39 are contained solely within Count II of the Complaint, which was dismissed with prejudice and, therefore, no response is required. To the extent a response is required, the Americor Defendants deny each and every allegation of paragraphs 34-39.

### COUNT III

**Misappropriation of Trade Secret pursuant to California Civil Code § 3426  
(All Defendants)**

39. In response to paragraph 40, the Americor Defendants repeat each and every of their respective allegations, admissions and denials contained in paragraphs 1 through 37, and incorporate same by reference as though fully set forth herein.

40. In response to paragraph 41, the Americor Defendants deny each and every allegation contained therein.

41. In response to paragraph 42, the Americor Defendants state that this paragraph consists solely of legal propositions and conclusions for which no

1 response is required. To the extent a response is required, the Americor Defendants  
2 deny each and every allegation of paragraph 42.

3

4 42. In response to paragraph 43, the Americor Defendants deny each  
5 and every allegation contained therein.

6

7 43. In response to paragraph 44, the Americor Defendants deny each  
8 and every allegation contained therein.

9

10 44. In response to paragraph 45, the Americor Defendants state that  
11 this paragraph consists solely of legal propositions and conclusions for which no  
12 response is required. To the extent a response is required, the Americor Defendants  
13 deny each and every allegation of paragraph 45.

14

15 45. In response to paragraph 46, the Americor Defendants state that  
16 this paragraph consists solely of legal propositions and conclusions for which no  
17 response is required. To the extent a response is required, the Americor Defendants  
18 deny each and every allegation of paragraph 46.

19

20 46. Paragraphs 47-54 are contained solely within Count IV of the  
21 Complaint, which was dismissed with prejudice and, therefore, no response is  
22 required. To the extent a response is required, the Americor Defendants deny each  
23 and every allegation of paragraphs 47-54.

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## **COUNT V**

### **Breach of Written Contract (Jabczynski)**

4           47. In response to paragraph 55, Jabczynski repeats each and every  
5 allegation, admission and denial contained in paragraphs 1 through 46, and  
6 incorporates same by reference as though fully set forth herein.

8           48. In response to paragraph 56, Jabczynski admits that he signed his  
9 offer letter from Plaintiff upon accepting employment and that he signed an  
10 Acknowledgment that Plaintiff provided him with an Employee Handbook, but  
11 specifically denies that they are valid or enforceable. Except to the extent  
12 specifically admitted, Jabczynski denies the remaining allegations of paragraph 56.

14           49. In response to paragraph 57, Jabczynski states that this paragraph  
15 consists solely of legal propositions and conclusions for which no response is  
16 required. To the extent a response is required, Jabczynski denies each and every  
17 allegation of paragraph 57.

19           50. In response to paragraph 58, Jabczynski states that this paragraph  
20 consists solely of legal propositions and conclusions for which no response is  
21 required. To the extent a response is required, Jabczynski denies each and every  
22 allegation of paragraph 58.

24               51. In response to paragraph 59, Jabczynski denies each and every  
25 allegation of paragraph 59.

27           52. In response to paragraph 60, Jabczynski states that this paragraph  
28 consists solely of legal propositions and conclusions for which no response is

required. To the extent a response is required, Jabczynski denies each and every allegation of paragraph 60.

53. In response to paragraph 61, Jabczynski is without sufficient knowledge or information to form a belief as to the truth of such allegations, and on that basis deny each and every allegation contained therein.

8           54. Paragraphs 62-74 are contained solely within Counts VI and VII  
9 of the Complaint, which was dismissed with prejudice and, therefore, no response is  
10 required. To the extent a response is required, the Americor Defendants deny each  
11 and every allegation of paragraphs 62-74.

COUNT VIII

**Unfair Competition pursuant to Cal. Bus. & Prof. Code § 17200  
(All Defendants)**

16           55. In response to paragraph 75, the Americor Defendants repeat  
17 each and every of their respective allegations, admissions and denials contained in  
18 paragraphs 1 through 54, and incorporate same by reference as though fully set forth  
19 herein.

21           56. In response to paragraph 76, the Americor Defendants state that  
22 this paragraph consists solely of legal propositions and conclusions for which no  
23 response is required. Moreover, the Americor Defendants note that Plaintiff's  
24 eighth cause of action cannot be based on Defendants' alleged misappropriation of  
25 Plaintiff's Trade Secrets in violation of 18 U.S.C. §1836 and California Civil Code §  
26 3426, as alleged in this allegation, pursuant to the Court's January 7, 2019 Order,  
27 and, therefore, no response is required to said allegation in paragraph 76. To the

1 extent a response is required, the Americor Defendants deny each and every  
2 allegation of paragraph 76.

3  
4 57. In response to paragraph 77, the Americor Defendants state that  
5 this paragraph consists solely of legal propositions and conclusions for which no  
6 response is required. To the extent a response is required, the Americor Defendants  
7 deny each and every allegation of paragraph 77.

8  
9 58. In response to paragraph 78, the Americor Defendants state that  
10 this paragraph consists solely of legal propositions and conclusions for which no  
11 response is required. To the extent a response is required, the Americor Defendants  
12 deny each and every allegation of paragraph 78.

13  
14 59. Paragraphs 79-84 are contained solely within Count IX, which  
15 was dismissed with leave to amend, but for which Plaintiff did not file a timely  
16 amendment and, therefore, no response is required. Paragraphs 85-88 are contained  
17 solely within Count X of the Complaint, which was dismissed with prejudice and,  
18 therefore, no response is required. To the extent a response is required, the Americor  
19 Defendants deny each and every allegation of paragraphs 79-84 and 85-88.

20  
21 **PRAYER FOR RELIEF**

22 60. The Americor Defendants deny that Plaintiff is entitled to any  
23 form of relief and, based thereon, deny generally and specifically each and every  
24 allegation of Plaintiff's Prayer for Relief.

1                   **AFFIRMATIVE DEFENSES**

2                   **FIRST AFFIRMATIVE DEFENSE**

3                   **(Failure to State a Cause of Action)**

4                 61. The Complaint, and each and every purported cause of action  
5 contained therein, fails to state facts sufficient to constitute a cause of action against  
6 the Americor Defendants.

7                   **SECOND AFFIRMATIVE DEFENSE**

8                   **(Waiver)**

9                 62. The Complaint, and each and every purported cause of action  
10 contained therein, is barred, in whole or in part, by the doctrine waiver by reason of  
11 the actions, acquiescence and course of conduct of Plaintiff, including, without  
12 limitation, Plaintiff's failure to take reasonable actions to ensure privacy protections  
13 once its allegedly proprietary information was disclosed publicly.

14                   **THIRD AFFIRMATIVE DEFENSE**

15                   **(Offset)**

16                 63. Even if there were a basis for an award of money damages in this  
17 action, the Americor Defendants would be entitled to an offset against any such  
18 award in the amount of any damages the Americor Defendants have suffered by  
19 virtue of Plaintiff's conduct, which, includes but is not limited to Plaintiff's: (1)  
20 fraud against Jabczynski (as alleged in the Counterclaim); and (2) conduct resulting  
21 in damages to Ganatra, subject to proof.

22                   **FOURTH AFFIRMATIVE DEFENSE**

23                   **(Lack Of Standing)**

24                 64. Plaintiff lacks standing to assert any claim under Count VIII of  
25 for alleged Unfair Competition (Cal. Bus. & Prof. Code § 17200) because Plaintiff

1 has not suffered an injury in fact and has not lost money or property as a result of  
2 any alleged non-trade secret conduct by the Americor Defendants.

3

4 **FIFTH AFFIRMATIVE DEFENSE**

5 **(Void as Against Public Policy)**

6 65. The contract provisions that Plaintiff seeks to enforce against  
7 Jabczynski are void as against public policy to the extent that, among other things,  
8 they (1) violate Jabczynski's Constitutional rights under the First Amendment, or (2)  
9 restrain Jabczynski from cooperating as a witness to Plaintiff's trade secret  
10 violations and fraudulent conduct, or (3) violate the litigation privilege. To the  
11 extent the contract is voided, all causes of action that depend on that contract also  
12 fail.

13

14 **SIXTH AFFIRMATIVE DEFENSE**

15 **(Unclean Hands)**

16 66. The Complaint and each of the causes of action asserted therein  
17 are barred by Plaintiff's own unclean hands. Among other things, Plaintiff has  
18 engaged in theft, fraud, and other unfair practices to solicit and divert BrandRep's  
19 customers and potential customers, including, through the improper copying,  
20 disclosure and use of the CRM Software or software based upon, or identical to,  
21 BrandRep's CRM Software. Plaintiff also has engaged in fraud with respect to  
22 Jabczynski (as alleged in the Counterclaim), and fostered a culture of deceit among  
23 its employees.

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1                   **SEVENTH AFFIRMATIVE DEFENSE**

2                   **(Non-Commercial Use)**

3         67. Plaintiff's claims are barred, in whole or in part, because the  
4 activity complained about constitutes non-commercial use, and, thus, is not  
5 actionable.

6

7                   **EIGHTH AFFIRMATIVE DEFENSE**

8                   **(No Economic Value)**

9         68. Plaintiff's claims are barred, in whole or in part, because the  
10 Americor Defendants did not derive any economic value from the information that  
11 allegedly was disclosed to it.

12

13                   **NINTH AFFIRMATIVE DEFENSE**

14                   **(No Entitlement to Damages)**

15         69. Plaintiff is not entitled to recover damages in connection with its  
16 claim under California Business & Professions Code § 17200 et seq.

17

18                   **TENTH AFFIRMATIVE DEFENSE**

19                   **(No Entitlement to Restitution)**

20         70. Plaintiff is not entitled to recover restitution in connection with  
21 its claim under California Business & Professions Code § 17200 et seq.

22

23                   **ELEVENTH AFFIRMATIVE DEFENSE**

24                   **(Conduct Not Unfair, Unlawful, or Fraudulent)**

25         71. Plaintiff's claims under California Business & Professions Code  
26 § 17200 et seq. are barred, in whole or in part, because the Americor Defendants'  
27 alleged conduct is not unfair, unlawful or fraudulent within the meaning of  
28 California Business & Professions Code § 17200 et seq.

1                   **TWELFTH AFFIRMATIVE DEFENSE**

2                   **(No Business Conduct)**

3                 72. Plaintiff's claims under California Business & Professions Code  
4 § 17200 et seq. are barred, in whole or in part, because the Americor Defendants'  
5 alleged conduct does not constitute "business conduct."

6

7                   **THIRTEENTH AFFIRMATIVE DEFENSE**

8                   **(Preemption)**

9                 73. Plaintiff's claims under California Business & Professions Code  
10 § 17200 et seq. are preempted by California Civil Code § 3426, et seq. to the extent  
11 they arise from the same nucleus of facts as the trade secret claims.

12

13                   **FOURTEENTH AFFIRMATIVE DEFENSE**

14                   **(The Americor Defendants Did Not Cause Injury Or Harm)**

15                 74. Plaintiff's claims are barred, in whole or in part, because to the  
16 extent Plaintiff suffered any injury, harm or incurred any damages as alleged in the  
17 Complaint, which the Americor Defendants deny, any such injury or damage was  
18 not caused by the Americor Defendants but, if anything, was caused and brought  
19 about by the acts, conduct or omissions of individuals or entities other than the  
20 Americor Defendants and, as such, any recovery herein should be precluded or  
21 diminished in proportion to the amount of fault attributable to such other individuals  
22 or entities.

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1                   **FIFTEENTH AFFIRMATIVE DEFENSE**

2                   **(Unavailability of Injunctive Relief)**

3       75. Plaintiff is not entitled to injunctive relief, because any injury to  
4 it is not immediate and irreparable, Plaintiff would have an adequate remedy at law,  
5 the balance of hardships favors no injunction and the public interest is best served  
6 by no injunction.

7                   **SIXTEENTH AFFIRMATIVE DEFENSE**

8                   **(Speculative Damages)**

9       76. The Americor Defendants alleges that Plaintiff cannot recover  
10 any of the damages alleged in the Complaint to the extent such damages, if any, are  
11 too speculative to be recoverable.

12                   **SEVENTEENTH AFFIRMATIVE DEFENSE**

13                   **(No Punitive Damages)**

14       77. To the extent Plaintiff seeks punitive damages, such claim does  
15 not meet the requirements for pleading a right to exemplary and punitive damages  
16 and, moreover, fails to meet the requirements of California law, violates the  
17 Americor Defendants' due process rights protected by the U.S. and California  
18 Constitutions, and violates the U.S. Constitution's prohibition against excessive  
19 fines.

20                   **EIGHTEENTH AFFIRMATIVE DEFENSE**

21                   **(Independent Development)**

22       78. Plaintiff's claims for misappropriation of trade secrets under  
23 Federal and California law are barred as a result of the BrandRep Defendants'  
24 independent development of the alleged trade secrets at issue.

1                   **NINETEENTH AFFIRMATIVE DEFENSE**

2                   **(Public Information)**

3       79. Plaintiff's claims for misappropriation of trade secrets under  
4 Federal and California law are barred because Plaintiff's alleged trade secrets are  
5 not non-public information.

6

7                   **TWENTIETH AFFIRMATIVE DEFENSE**

8                   **(Failure to Maintain Secrecy)**

9       80. Plaintiff's claims for misappropriation of trade secrets under  
10 Federal and California law are barred because Plaintiff failed to maintain the secrecy  
11 of the alleged trade secrets.

12

13                   **TWENTY-FIRST AFFIRMATIVE DEFENSE**

14                   **(Illegal Contract)**

15       81. Plaintiff's claim for breach of contract is barred because the  
16 alleged contract(s) are illegal pursuant to California Civil Code §§ 1608 and 1667  
17 in that they are contrary to good morals and impinge the public welfare by operating  
18 to forbid Jabczynski from disclosing Plaintiff's wrongful conduct described in the  
19 Counterclaim.

20

21                   **TWENTY-SECOND AFFIRMATIVE DEFENSE**

22                   **(Failure to Mitigate Damages)**

23       82. Plaintiff failed to take reasonable steps to mitigate its alleged  
24 damages.

1                   **TWENTY-THIRD AFFIRMATIVE DEFENSE**

2                   **(No Damages)**

3       83. Even in Plaintiff's other allegations are true, Plaintiff did not  
4 suffer damages.

5

6                   **TWENTY-FOURTH AFFIRMATIVE DEFENSE**

7                   **(Void as Procured by Fraud)**

8       84. Plaintiff's claim for breach of contract is barred because the  
9 alleged contract(s) are void as a result of being procured by fraud as alleged in the  
10 Counterclaim.

11

12                   **TWENTY-FIFTH AFFIRMATIVE DEFENSE**

13                   **(Privilege/Justification)**

14       85. The Americor Defendants' alleged conduct is protected from  
15 liability through the operation of various privileges and/or justification:

16                   (a) The litigation privilege protects the Americor Defendants'  
17 alleged use of any of Plaintiff's claimed trade secret information in relation to the  
18 Delaware Court of Chancery action;

19                   (b) The manager's privilege protects Banir's alleged  
20 disclosure of any of Plaintiff's claimed trade secret information to the BrandRep  
21 Defendants because of his status of a member of BrandRep's board of directors; and

22                   (c) The Americor Defendants' actions are otherwise justified  
23 because exposing Plaintiff's fraud and misappropriation has a greater social value  
24 than insuring the stability of its contracts with Jabczynski or of the secrecy of its  
25 claimed trade secret information.

1                   **TWENTY-SIXTH AFFIRMATIVE DEFENSE**

2                   **(Additional Affirmative Defenses)**

3       86. The Americor Defendants presently have insufficient knowledge  
4 or information on which to form a belief as to whether they may have additional  
5 affirmative defenses. The Americor Defendants reserve their right to file an  
6 amended answer asserting additional affirmative defenses in the event that discovery  
7 indicates that they are appropriate.

8

9                   **PRAYER FOR RELIEF ON PLAINTIFF'S COMPLAINT**

10          WHEREFORE, the Americor Defendants pray for judgment as follows:

11

12       1. That Plaintiff takes nothing by reason of the Complaint;

13

14       2. That the Complaint, and each and every purported claim for  
15 relief alleged therein, be dismissed with prejudice;

16

17       3. That the Americor Defendants be awarded their reasonable costs  
18 incurred herein; and

19

20       4. That the Americor Defendants be awarded their reasonable  
21 attorneys' fees incurred herein; and

22

23          For such other and further relief as this Court deems just and proper.

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## **AMENDED COUNTERCLAIM**

Defendant and Counter-claimant Allan Jabczynski (“Jabczynski”) hereby amends his counterclaim and alleges against Plaintiff and Counter-defendant Business Solutions, LLC (“Business Solutions”) as follows:

7           1. Jabczynski seeks to recover damages, costs and attorneys' fees as  
8 a result of Business Solutions' fraud. Jabczynski also seeks a declaration from the  
9 Court that the various agreements Business Solutions alleges Jabczynski breached  
10 (the "Alleged Agreements"), which allegedly purport to bar Jabczynski from  
11 disclosing Business Solutions' fraudulent business practices for use in litigation, are  
12 void because they: (1) were procured by Business Solutions' fraud; (2) are illegal;  
13 and (3) are contrary to public policy.

## **JURISDICTION AND VENUE**

17           2. This Court has subject matter jurisdiction over this matter  
18 through the supplemental jurisdiction provisions of 28 U.S.C. § 1337(a), because  
19 this Counterclaim forms part of the same case or controversy as the original claims  
20 brought by Business Solutions over which this Court has original jurisdiction. This  
21 Court also has subject matter jurisdiction over this matter under the Declaratory  
22 Judgment Act, 28 U.S.C. § 2201. It presents an actual case or controversy under  
23 Article III of the United States Constitution and serves the essential purpose of  
24 clarifying and settling the legal rights at issue.

26           3.     Venue in this Court is proper under 28 U.S.C. ¶ 1391 because  
27 Business Solutions does business and is subject to personal jurisdiction in this  
28 District, Business Solutions consented to venue in this District, and a substantial part

1 of the events or omissions giving rise to Jabczynski's claims occurred in this  
2 District.

3

4 **PARTIES**

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6 4. Counter-claimant Jabczynski is an individual residing in Garden  
7 Grove, California.

8

9 5. Counter-defendant Business Solutions is a limited liability  
10 company allegedly organized under the laws of the state of Delaware, with its  
11 principal place of business allegedly located in Costa Mesa, California.

12

13 **GENERAL ALLEGATIONS**

14

15 6. In or around the first week of November 2017, Jabczynski  
16 applied for several jobs that he found on Indeed.com. The job posting by Business  
17 Solutions did not state the business' name. However, within a day or two of  
18 applying, Jabczynski was contacted telephonically regarding his application by  
19 Jeffrey Barela, the sales training manager of Business Solutions. Mr. Barela was  
20 initially very illusive on the phone, he asked Jabczynski some basic questions,  
21 whether he enjoyed talking to people, how his interpersonal skills were, and told  
22 Jabczynski that he was hiring for a company named Ad.IQ. At the end of that phone  
23 call, Jabczynski was asked to come in to interview in person.

24

25 7. On November 7, 2017, Jabczynski met in-person with Mr. Barela  
26 and Mike Nordin, the sales department manager of Business Solutions, at Business  
27 Solutions' Costa Mesa office. During this second, in-person interview, Jabczynski  
28 was provided more details regarding the proposed job, including that he would hold

1 an inside sales position and would be selling search engine optimization and related  
2 internet marketing products to small and mid-sized businesses. Prior to leaving,  
3 Jabczynski was told that he would receive an offer letter and other paperwork that  
4 same evening.

5

6       8. And, indeed, on the evening of November 7, 2017, Jabczynski  
7 received an offer of employment from Ad.IQ (“Offer Letter”), which he accepted.  
8 The Offer Letter was disclosed prior to any employment relationship and without  
9 any confidentiality agreement, and it freely disclosed the commission rate and  
10 compensation that was being offered to Jabczynski.

11

12       9. On November 8, 2017, Jabczynski began work for Business  
13 Solutions. It was only then that Jabczynski was informed that the true corporate  
14 name of Ad.IQ was Business Solutions, LLC, when he was provided with a Notice  
15 to Employee of the true legal name and address of his employer along with other  
16 paperwork, as required by California Labor Code Section 2810.5. During his  
17 employment, Jabczynski worked exclusively from Business Solutions’ Costa Mesa  
18 address.

19

20       10. Jabczynski’s first five days of employment consisted of training,  
21 under Mr. Barela. As part of this training, Mr. Barela instructed Jabczynski to  
22 falsely represent to third parties that Ad.IQ was based out of Las Vegas, Nevada,  
23 instead of Costa Mesa, where he was working and where it was actually located.  
24 During this training, Mr. Barela also informed Jabczynski of the names of Business  
25 Solutions’ competitors, including BrandRep, LLC (“BrandRep”).

26

27       11. In performing his job, Jabczynski utilized a customer  
28 relationship management platform. The customer relationship management

1 platform provided Jabczynski with names of companies, from among the millions of  
2 small and mid-sized business in North America, that he should contact to offer  
3 Business Solutions' services ("Leads").  
4

5           12. During the entirety of Jabczynski's employment, Jabczynski did  
6 not know that Business Solutions was utilizing an improper, illegal and illicit copy  
7 and/or version of a customer relationship management software program ("CRM  
8 Software") that rightfully was owned, to the exclusion of all others, by BrandRep.  
9 During the entirety of Jabczynski's employment, Jabczynski also did not know that,  
10 not only was Business Solutions improperly, illegally and illicitly using a version of  
11 BrandRep's CRM Software, but that, he is informed and believes, many of its Leads  
12 apparently were obtained through its use of "bots" that were surreptitiously and  
13 illegally placed within BrandRep's version of the CRM Software.

14

15           13. After he had been working at Business Solutions for a month or  
16 two, in or around December 2017 or January 2018, Jabczynski became aware that  
17 some of the veteran sales employees of Business Solutions, including Bibhor "Bob"  
18 Upreti and Josh Montelongo, were able to switch between the customer relationship  
19 management platform for Ad.IQ and a customer relationship management platform  
20 for BeRanked, to which Jabczynski did not have access. Jabczynski knew from his  
21 prior job searches, that BeRanked had been in the same industry as Ad.IQ, and upon  
22 inquiring as to why they were able to switch back and forth between the two  
23 different customer relationship management platforms, Mr. Upreti and Mr.  
24 Montelongo informed Jabczynski that Business Solutions changed its dba from  
25 BeRanked to Ad.IQ as a result of a lawsuit, but that they had access to look up leads  
26 that they had followed-up on when Business Solutions was still operating as  
27 BeRanked. Shortly after speaking with Mr. Upreti and Mr. Montelongo, Mr. Nordin  
28 instructed Jabczynski not to post such information on social media or otherwise,

1 including a specific directive not to change his employer information on social  
2 media profiles.

3

4       14. In February 2018, a man who identified himself as Ron Gomez,  
5 but who Jabczynski was later made aware was named Ronald Ruskey, instructed  
6 Jabczynski, and the entire sales floor that unnamed “outside forces” were trying to  
7 take down Business Solutions, but that they were not at fault and Business Solutions  
8 would not be sued.

9

10      15. Thereafter, in February or March 2018, Mr. Nordin instructed  
11 Jabczynski, and the entire the sales floor, that each time he closed a sale to a  
12 customer who has previously been contacted by BrandRep, or anytime anyone  
13 contacted him regarding BrandRep or mentioned BrandRep, he was to send an email  
14 to a specific email address at Ad.IQ with the customer’s information. This in-  
15 person speech was followed up with an email blast to the sales team reiterating that  
16 anything related to BrandRep needed to be sent to Ms. Deirdre Mammano, the Chief  
17 Executive Officer of Business Solutions. Jabczynski was never told to send such an  
18 email for any other customers or competitors and was never told why such an email  
19 needed to be sent.

20

21      16. Finally, in May or June 2018, Mr. Nordin and Ms. Mammano  
22 instructed Jabczynski, and the entire sales floor, to conceal the fact that Business  
23 Solutions dba Ad.IQ was in the business of selling search engine optimization, and  
24 instead to lie to third parties by saying that Ad.IQ was solely in the business of  
25 “Social Media Marketing.” It was around this time that Mr. Jabczynski began  
26 seeking employment elsewhere.

1           17. As detailed above, Jabczynski became aware of Business  
2 Solutions' fraudulent business practices, all of which were concealed from him  
3 when he executed the Alleged Agreements, slowly over his tenure at Business  
4 Solutions. But, Jabczynski did not become aware of the full extent of Business  
5 Solutions fraudulent business practices until after he had ceased his employment at  
6 Business Solutions, and had begun his new job with Defendant Americor Funding,  
7 Inc. ("Americor"). Specifically, when, after he had begun work at Americor,  
8 Defendant Banir Ganatra showed him BrandRep's customer relationship  
9 management platform and explained that Mr. Chad Ruskey and he had sold the  
10 rights to the CRM Software to the new owners of BrandRep. In response, Mr.  
11 Jabczynski agreed to submit an affidavit in support of BrandRep's lawsuit in the  
12 Delaware Court of Chancery, acknowledging Business Solutions' use of a nearly  
13 identical customer relationship management platform, detailing his knowledge of  
14 Business Solutions' other fraudulent business practices and explaining his  
15 experience working within Business Solutions' culture of deceit.

17           18. If Jabczynski had been aware of Business Solutions' fraudulent  
18 business practices and culture of deceit, as detailed in Paragraphs 10 through 16, at  
19 the time that he executed the Alleged Agreements he would not have executed the  
20 Alleged Agreements and thereby purportedly obligated himself to conceal said  
21 fraudulent business practices and refrain from exposing said fraudulent business  
22 practices to the public, the Delaware Court of Chancery or in any other litigation.

## **FIRST CAUSE OF ACTION**

### **(Fraud—Concealment)**

19. Jabczynski incorporates by this reference the allegations  
20 contained in paragraphs 1 through 18, inclusive, as though set forth in full.

1           20. During Jabczynski's interview process, which occurred both  
2 telephonically and in-person in the first week of November 2017, and in the Offer  
3 Letter, Business Solutions freely disclosed, without any confidentiality agreement,  
4 various details regarding the position Jabczynski was being offered and the job he  
5 would be asked to perform should he accept it, including, without limitation, the  
6 position he would hold, the type of work Business Solutions was engaged in, and the  
7 amount of his proposed compensation and commission rate. However, Business  
8 Solutions intentionally failed to disclose the below material adverse facts, among  
9 other things, which were at that time known only to Business Solutions:

10

11                 a) that Business Solutions was improperly and illegally  
12 utilizing a copy and/or version of BrandRep's CRM Software and/or Data to run its  
13 business;

14

15                 b) that Business Solutions was improperly and illegally  
16 diverting customers from BrandRep through the use of "bots" placed within  
17 BrandRep's version of its CRM Software;

18

19                 c) that Business Solutions wanted him to lie to customers by  
20 saying that Business Solutions was based in Las Vegas, Nevada when, in fact, it was  
21 based out of Costa Mesa where he worked;

22

23                 d) that Business Solutions wanted him to conceal the fact that  
24 Business Solutions changed its dba from BeRanked to Ad.IQ, and to not post such  
25 information on social media or otherwise, including the specific directive not to  
26 change his employer information on social media profiles;

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28

e) that Business Solutions wanted him to conceal the fact that Business Solutions dba Ad.IQ was in the business of selling search engine optimization but, rather, to lie to third parties by saying that Ad.IQ was in the business of “Social Media Marketing”; and

f) that Business Solutions had a culture of deceit.

21. Jabczynski did not know any of the facts set forth above at the time he executed the Alleged Agreements, and he could not have otherwise discovered them.

22. Business Solutions intended to deceive Jabczynski by failing to disclose and concealing the facts set forth above.

23. If Business Solutions had disclosed the facts set forth above, Jabczynski would not have executed the Alleged Agreements and thereby purportedly obligated himself to conceal said fraudulent business practices and refrain from exposing said fraudulent business practices to the public, the Delaware Court of Chancery or in any other litigation.

24. Jabczynski has suffered economic damages as a result of Business Solutions' fraud, in an amount to be proven at trial. Jabczynski has also suffered emotional distress because he reasonably relied on Business Solutions' failure to disclose the true nature of its business and its deceitful practices, and was instead improperly induced into working for a dishonest company and then sued for exposing Business Solutions' fraudulent business practices, as alleged above. Further, the Alleged Agreements should be rescinded due to Business Solutions' fraudulent conduct.

25. Business Solutions' concealment was a substantial factor in causing Jabczynski's damages. Jabczynski has suffered damages as a result of Business Solutions' conduct.

26. Business Solutions conduct was intentional and undertaken with malice, fraud and oppression. As a result, Jabczynski is entitled to an award of exemplary and punitive damages according to proof at trial.

## **SECOND CAUSE OF ACTION**

**(Declaratory Relief—28 U.S.C. Section 2201)**

27. Jabczynski incorporates by this reference the allegations contained in paragraphs 1 through 26, inclusive, as though set forth in full.

28. An actual controversy has arisen and now exists between Jabczynski, on the one hand, and Business Solutions, on the other hand, concerning their respective rights and duties relating to the Alleged Agreements. Jabczynski, by way of this Counterclaim, unilaterally rescinds those Alleged Agreements as having been procured by fraud, illegal and contrary to public policy.

29. Business Solutions denies that the Alleged Agreements were procured through fraud, are illegal or are contrary to public policy, and, thus, that they are properly rescinded by Jabczynski.

30. The Alleged Agreements were procured by fraud as alleged in detail above. Moreover, the Alleged Agreements are illegal pursuant to California Civil Code Sections 1608 and 1667 in that by operating to forbid Jabczynski from disclosing Business Solutions' fraudulent business practices they are contrary to

1 good morals and impinge the public welfare. Business Solutions' attempt to use the  
2 Alleged Agreements' to silence a witness to Business Solutions' improper and  
3 fraudulent conduct violates Jabczynski's First Amendment rights and thus is also  
4 contrary to public policy.

5  
6 31. A determination of the enforceability of the alleged agreements  
7 is necessary and proper at this time to avoid further prejudice to Jabczynski.

8  
9 32. Jabczynski desires a judicial determination as to the  
10 enforceability of the Alleged Agreements against him, and specifically requests that  
11 this Court declare the Alleged Agreements are rescinded and void ab initio.

12  
13 **PRAYER FOR RELIEF**  
14

15 WHEREFORE, Counter-claimant Jabczynski prays that judgment be  
16 entered in this action against Counter-defendant Business Solutions as follows:

17  
18 (1) for special and general damages according to proof;

19  
20 (2) for compensatory damages against Counter-defendant Business  
21 Solutions to be proven at trial;

22  
23 (3) for punitive damages;

24  
25 (4) for a declaration that the various agreements Counter-defendant  
26 Business Solutions alleges Counter-plaintiff Jabczynski and it entered into in the  
27 Complaint (the Alleged Agreements) are void ab initio as a result of Counter-

1 defendant Business Solutions' fraud, as well as because they are illegal and contrary  
2 to public policy;

3  
4 (5) for enforcement of Jabczynski's rescission of the Alleged  
5 Agreements and his consequential damages related thereto;

6  
7 (6) for reimbursement of all expenses and costs of suit, including  
8 reasonable attorneys' fees and costs, court costs, and prejudgment interest, against  
9 Counter-defendant Business Solutions; and

10  
11 (7) for all other relief this Court deems to be fair, just, reasonable  
12 and appropriate.

13  
14 Dated: March 11, 2019

15 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
16

17 By \_\_\_\_\_ s/ James M. Burgess  
18 \_\_\_\_\_ JAMES M. BURGESS

19 Attorneys for Defendants  
20 BANIR GANATRA, ALLAN JABCZYNSKI  
21 and AMERICOR FUNDING, INC. and  
22 Counter-Claimant ALLAN JABCZYNSKI

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1                           **DEMAND FOR JURY TRIAL**  
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3                           Counterplaintiff Jabczynski demands a jury trial on all issues so triable.  
4

5 Dated: March 11, 2019

6                           SHEPPARD, MULLIN, RICHTER & HAMPTON LLP  
7

8                           By                           *s/ James M. Burgess*  
9   JAMES M. BURGESS

10                          Attorneys for Defendants  
11                          BANIR GANATRA, ALLAN JABCZYNSKI  
12                          and AMERICOR FUNDING, INC. and  
13                          Counter-Claimant ALLAN JABCZYNSKI  
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